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Order 2002-4-19



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 25th day of April, 2002

Served: April 25, 2002

Application of

CONTINENTAL AIRLINES, INC.

For a waiver of the dormancy conditions
applicable to certain of its U.S.-Brazil, U.S.-
Ecuador, and U.S.-Japan frequency allocations

Docket OST-2002-11615

Application of

AMERICAN AIRLINES, INC.

For a waiver of the dormancy condition applicable
to its New York (JFK)-Rio de Janeiro frequency
allocation

Docket OST-1999-6284

Application of

DELTA AIR LINES, INC.

For a temporary allocation of U.S.-Brazil
combination service frequencies for Atlanta-Rio
de Janeiro service

Docket OST-2002-11627

Application of

DELTA AIR LINES, INC.

For a permanent allocation of U.S.-Brazil
combination service frequencies for Atlanta-Rio
de Janeiro service

Docket OST-2002-11711 - 7

SUMMARY

By this order, we grant dormancy waiver extensions to Continental Airlines and American Airlines through December 31, 2002, and January 8, 2003, respectively, with respect to their U.S.-Brazil service frequency allocations. In addition, we grant the application of Delta Air Lines for a temporary, indefinite allocation of four weekly U.S.-Brazil service frequencies for continuation of its Atlanta-Rio de Janeiro services. Finally, we defer action on the application of Delta for a permanent allocation of four weekly U.S.-Brazil service frequencies.

BACKGROUND

By Notice of Action Taken on November 2, 2001, in Docket OST-2001-10782, the Department granted Delta a temporary allocation of four weekly unused U.S.-Brazil frequencies through March 31, 2002. Separately, in response to the events of September 11, by Order 2001-11-15, the Department granted all U.S. carriers a blanket waiver of the dormancy conditions applicable to their limited-entry route authorities through March 31, 2002.

The blanket waiver was subject to the condition that carriers notify the Department by February 15, 2002, of each market where they will not resume service beginning April 1, 2002. The Department also stated that carriers would be free to seek extensions of the dormancy waiver for specific city-pair limited-entry services where they could demonstrate that circumstances warrant. Furthermore, we stated that Delta could seek an additional extension of its temporary U.S.-Brazil frequency allocation if and when other authorized U.S.-Brazil carriers seek further extensions of their U.S.-Brazil dormancy waivers.¹

For procedural reasons, by Notice of Action Taken dated March 22, 2002, in Docket OST-2002-11627, we granted Delta an interim 30-day extension of its temporary U.S.-Brazil frequency award through April 30, 2002.² In addition, by a separate Notice of Action Taken dated March 22, 2002, in Dockets OST-2002-11615 and OST-1999-6284, we granted Continental and American interim 30-day extensions of their U.S.-Brazil dormancy waivers through April 30, 2002.

The notices deferred on the balance of applications filed by Delta, Continental, and American seeking longer-term extensions of their U.S.-Brazil authorizations. This order disposes of the deferred portions of these applications, and a separate but related U.S.-Brazil frequency application filed by Delta (see below).

APPLICATIONS AND RESPONSIVE PLEADINGS

On February 15, 2002, Continental and American filed applications for further U.S.-Brazil dormancy waivers for four and two frequencies, respectively, through December 31, 2002, and

¹Delta filed a Petition for Reconsideration of Order 2001-11-15, requesting, *inter alia*, that the Department establish a specific due date for requests for further U.S.-Brazil dormancy waivers. Upon reconsideration, by Order 2002-2-2, the Department decided, *inter alia*, to establish February 15, 2002, as the date for filing further requests for U.S.-Brazil dormancy waivers.

²Delta is currently using its temporary frequencies to provide service in the Atlanta-Rio de Janeiro market.

January 8, 2003, respectively. Delta filed an answer opposing the applications. American filed a response.³

On February 19, 2002, in Docket OST-2002-11627, Delta filed an application for a temporary, indefinite allocation of four weekly U.S.-Brazil combination service frequencies for continuation of its Atlanta-Rio de Janeiro services, subject to a recall of no less than 90 days' notice to Delta and the Department by the last carrier requesting frequencies to operate a previously authorized U.S.-Brazil service. American, Continental, and the Georgia and Atlanta Civic Parties (the State of Georgia, the City of Atlanta, Atlanta Hartsfield International Airport, and the Metro Atlanta Chamber of Commerce) filed answers to Delta's application. Delta filed a reply.

On February 27, 2002, in Docket OST-2002-11711, Delta filed an application for permanent allocation of four weekly U.S.-Brazil service frequencies. American, Continental, and the Georgia and Atlanta Civic Parties filed answers. Delta filed a reply.

United filed a consolidated response to all of the applications referenced above.⁴

SUMMARY OF ARGUMENTS

1. Continental's and American's U.S.-Brazil Dormancy Waivers:

Continental states that, due to the continued economic uncertainties stemming from the events of September 11, and a sustained decline in the demand for U.S.-Brazil services, it requires a further waiver through December 31, 2002, for four of its New York (Newark)-Rio de Janeiro flights.

Delta urges the Department to deny any further U.S.-Brazil dormancy waivers. Furthermore, Delta states that the Department should allow unused U.S.-Brazil frequencies to revert to the Department for reallocation. Delta indicates that Continental has failed to provide any specific service resumption plans for use of its four U.S.-Brazil frequencies.

American states that it briefly suspended nonstop service between New York (JFK) and Rio de Janeiro after September 11, but then resumed service in the market beginning December 15, 2002. Nonetheless, due to unfavorable economic conditions and a shortage of long-range wide-body aircraft, American states that it has suspended two of its seven New York (JFK)-Rio de Janeiro services. In this connection, American states that it needs a further waiver for these two frequencies through January 8, 2003, when it intends to resume daily service.

Delta argues that the two New York-Rio de Janeiro frequencies for which American seeks a dormancy waiver are two of the very same frequencies that American previously sought to divert to Miami, thus triggering the *1999 U.S.-Brazil Combination Service Case*.

³American's response was accompanied by a motion for leave to file an otherwise unauthorized document. We will grant the motion.

⁴United's response was accompanied by a motion for leave to file an otherwise unauthorized document. We will grant the motion.

In response, American states that granting its dormancy waiver would allow American to operate a daily service beginning January 8, 2003, in an important U.S.-Brazil market (New York-Rio de Janeiro) that has no nonstop service by any other carrier.

2. Delta's Application for Temporary U.S.-Brazil Frequencies:

Delta states that it is currently providing service in the Atlanta-Rio de Janeiro market using its temporary allocation of four frequencies, and that it requires a further extension of authority to keep these services operational. Delta requests an indefinite, temporary allocation of four frequencies that would be subject to a recall of no less than 90 days' notice to Delta and the Department by the last carrier requiring frequencies to operate a previously authorized U.S.-Brazil service.

Delta argues that the other authorized U.S.-Brazil carriers (American, Continental, and United) all have unused frequencies, which would allow the Department to fund Delta's request for a temporary, indefinite allocation of U.S.-Brazil frequencies. Delta states there is a shortage of U.S.-Brazil frequencies that serves to block new entry, or subjects competitors to continued and unreasonable risk of loss of frequencies to maintain existing services. Delta further states that the Department should grant Delta's request from an unspecified source, so that its Atlanta-Rio de Janeiro services will not be subject to recall until the last frequencies are exhausted from among the many sources of available unused frequencies.

The Georgia and Atlanta Civic Parties support Delta's request, and urge the Department to grant Delta a temporary allocation to continue Delta's services from Atlanta.

American and Continental state that they do not oppose Delta's application, provided that the Department also grants their applications for U.S.-Brazil dormancy waivers.⁵ United states that Delta's request would allow Delta sufficient flexibility to plan at least through the end of this year when Continental and American propose to reuse their unused frequencies.

Delta replies that there is no linkage or conflict between Delta's request for a temporary allocation and the pending dormancy waiver applications of Continental and American. Delta further states that the Department should consider the merits of Continental's and American's dormancy waiver requests in the separate dockets established for those applications.

3. Delta's Application for a Permanent Allocation of U.S.-Brazil Frequencies:

Delta requests that the Department grant Delta a permanent allocation of four U.S.-Brazil frequencies. Delta argues that such an allocation would allow Delta to maintain its existing Atlanta-Rio de Janeiro services without having to risk forfeiture at the whim of competitors that have more frequencies than Delta. Delta states that there is simply no justification for allowing carriers to hold on to valuable U.S.-Brazil frequencies when Delta's lack of a permanent allocation is constraining its ability to compete effectively in providing U.S.-Brazil services.

⁵Continental makes its non-objection further contingent on the condition that the frequencies will be subject to recall, as requested by Delta, on 90 days' notice to Delta and the Department by the last carrier requiring frequencies to operate authorized Brazil service. American makes its non-objection contingent on receiving its U.S.-Brazil dormancy waiver at the same time that Delta receives its temporary indefinite frequency allocation.

Delta contends that, in contrast to Continental and American, it is ready, willing, and able to put U.S.-Brazil frequencies to permanent productive use. Delta maintains that it is the only U.S.-Brazil carrier to have fully and continuously used its entire frequency allocation, and that it is unfair and contrary to the public interest to subject Delta's current daily nonstop Atlanta-Rio de Janeiro service to an indefinite risk of loss to carriers holding permanent U.S.-Brazil frequency awards.

In addition, Delta states that its ability to compete for long-term travel agency and consolidator contracts, corporate accounts, and vacation tour packages will be hindered as long as Delta's long-term service levels remain in flux due to the temporary nature of its four U.S.-Brazil frequencies. Delta indicates that it does not dispute that current economic conditions have created severe strains on all U.S. carriers. However, Delta argues that, unlike other carriers, it has chosen not to retrench from Brazil. Out of the six unused U.S.-Brazil frequencies (four by Continental and two by American), Delta argues that four should be permanently reallocated to Delta, and that the remaining two should stay in an unallocated pool for reallocation when necessary.

The Georgia and Atlanta Civic Parties support Delta's application so that Delta can maintain its daily nonstop Atlanta-Rio de Janeiro service.

American states that the four permanent frequencies that Delta is seeking should not be reallocated from American.⁶ American maintains that there are many other dormant frequencies available to fund Delta's request, including four held by Continental and another seven held by United. American argues that United's seven frequencies, while not subject to a dormancy condition due to the happenstance that they were awarded before the Department instituted its standard 90-day dormancy policy, should nonetheless be placed at issue in any reallocation proceeding, along with Continental's.

Delta states that it takes no position on whether to place any so-called "grandfather" frequencies at issue.

United indicates that the current drop in U.S.-Brazil frequency utilization is due to the "calamitous" drop in demand following the events of September 11.⁷ Against this background, United states that it opposes the scheduling of any proceeding to consider a permanent reallocation of unused U.S.-Brazil frequencies at this time. United maintains that, with the possible exception of Continental, each of the designated U.S.-Brazil carriers now has a plan to restart services that were affected by the events of September 11, and that the Department should not allow interference with those plans. United also argues that, if 90 days before the planned restart time, it appears that any of Continental's or American's frequencies will continue to go unused, the Department could then revisit the issue of whether to consider a permanent reallocation.

⁶In this connection, American reiterates that it will resume daily nonstop New York-Rio de Janeiro service effective January 8, 2003. American states that it has two other so-called "grandfather" frequencies, not subject to the 90-day dormancy condition, which are currently unused. However, American maintains that it will start using these frequencies on January 8, 2003, for Miami-Rio de Janeiro service. Overall, American states that it will be using all 49 of its U.S.-Brazil frequencies as of January 8, 2003.

⁷To support this claim, United states that, in the three month period November 2001 – January 2002, United's U.S.-Brazil traffic is down between 19% and 33% per month compared to the corresponding month of last year.

However, until that time is reached, United maintains that the Department should undertake no proceeding to permanently reallocate frequencies, which are not yet restored due to the impact of September 11.⁸ In summary, United states that the Department should grant the requested U.S.-Brazil dormancy waivers to American and Continental, and dismiss, without prejudice, Delta's request for a permanent reallocation of frequencies.

Continental agrees with United that this is no time to be making long-term frequency allocation decisions. In this regard, Continental cites the following: according to the *Aviation Daily* of March 4, 2002, international demand in Brazil dropped 5.2% in January 2002 compared to January 2001; the Federal Aviation Administration (FAA) is forecasting a 12% decrease in overall enplanements for 2002 versus 2001; and, finally, Continental notes that carriers' current and proposed Brazil schedules fluctuate widely. Overall, Continental urges the Department to defer action on Delta's request for a permanent reallocation of U.S.-Brazil frequencies; grant the U.S.-Brazil dormancy waivers requested by Continental and American; and consider carrier plans for use of U.S.-Brazil frequencies in autumn of this year before deciding to move forward with any proceedings to consider permanent reallocations.⁹

In its reply, Delta notes that none of the opposing carriers has any immediate plans to use its U.S.-Brazil frequencies. Delta maintains that no exceptional circumstances have been shown that would warrant the Department granting additional waivers for U.S.-Brazil services. Specifically, Delta argues that the fact that Continental, American, and United have not resumed service in the U.S.-Brazil market, but have expanded service in other markets, demonstrates that further U.S.-Brazil dormancy waivers for these carriers are not warranted. Delta urges the Department to immediately allocate Delta four permanent frequencies. However, in the event that the Department decides not to do so, Delta requests that the Department select Delta as a backup carrier, should any carrier default on its dormancy waiver or stated restart plans, or cease service, for a period of one year.

DECISION

We have decided to grant the U.S.-Brazil dormancy waivers requested by Continental and American through December 31, 2002, and January 8, 2003, respectively.¹⁰ In addition, we have decided to grant Delta's application for a temporary, indefinite allocation of four weekly U.S.-Brazil frequencies for continuation of its Atlanta-Rio de Janeiro services, which will revert upon no less than 90 days' written notice to Delta and the Department by American and/or Continental, as the case may be, should either of these carriers require frequencies being used by Delta to

⁸In the event that the Department were to consider a permanent reallocation proceeding of U.S.-Brazil frequencies at this time, United argues that there is no basis for granting American's request to include United's frequencies in such a proceeding. United states that it has firm plans to use its seven temporarily suspended U.S.-Brazil frequencies starting October 31, 2002, for daily nonstop New York-Sao Paulo services.

⁹In the event that the Department considers permanent reallocations, Continental maintains that frequencies should be reallocated from American first, to ensure effective competition from other carriers, and then from United, given its continued retrenchment from Latin America.

¹⁰Continental's dormancy waiver request includes not only four U.S.-Brazil frequencies, but also one-and-a-half U.S.-Ecuador and two U.S.-Japan frequencies as well. We granted the U.S.-Ecuador and U.S.-Japan waiver requests by a separate Notice of Action Taken dated March 22, 2002, in Docket OST-2002-11627.

operate a previously authorized U.S.-Brazil service.¹¹ Finally, we have decided to defer action on Delta's application for a permanent allocation of four weekly U.S.-Brazil frequencies.

By Order 2001-11-15, we decided to grant blanket dormancy waivers to all U.S. carriers holding limited-entry authority, including Continental and American, subject to certain conditions specified in the order. In granting the waivers, we cited the need to provide carriers added flexibility with regard to their limited-entry authorities, given marketplace uncertainties associated with the events of September 11, as well as the need to ensure that services in restricted markets are available to consumers to the fullest extent possible. We also made clear our readiness to extend the dormancy waivers in specific markets where doing so could be shown to be warranted. Finally, we expressly stated that we would entertain applications for temporary authorizations to facilitate service while waivers continued.

The record shows that international demand in Brazil has dropped significantly and may not recover this year. The record also shows that Continental and American still need additional time to readjust their service patterns in the wake of the events of September 11. At the same time, both carriers continue to indicate a desire to maintain the flexibility to resume their Brazil services when circumstances permit.

Against this background, we believe that it would best serve the public interest to provide Continental and American the additional dormancy waivers they seek.¹² We do not find that it would be appropriate now, given the current economic climate in the U.S.-Brazil market, to make any decisions regarding permanent reallocations or back-up awards regarding U.S.-Brazil frequencies. Rather, we believe that the public interest would be best served here by deferring action on Delta's application for a permanent U.S.-Brazil frequency award. We may decide to reevaluate the situation at a later date, including consideration of Delta's permanent U.S.-Brazil frequency request, should it appear that U.S.-Brazil frequencies would continue to go unused.

Saying this, we firmly believe that the public interest calls for our promoting service during the waiver period. In this regard, granting Delta's request for a temporary, indefinite allocation will enable Delta to continue its daily service between Atlanta and Rio de Janeiro. We recognize that Delta is currently providing valuable U.S.-Brazil services to the traveling public. Moreover, Delta is managing to provide such services in the face of difficult market circumstances.

¹¹Specifically, we will require American and Continental to file a written notice with the Department, served on all parties holding U.S.-Brazil frequencies, no later than 90 days prior to resuming any previously authorized U.S.-Brazil services using their currently unused frequencies. Such notice should specify the number of frequencies to be used, the market(s) to be served, and the date on which U.S.-Brazil service will be resumed. After American and/or Continental, to which we are granting dormancy waivers for a total of six U.S.-Brazil frequencies, collectively resume the operation of two currently unused frequencies, any decision by either carrier to resume one or more additional frequencies would cause Delta to lose the ability to use such frequency or frequencies, and the carrier(s), which had provided the required written notice 90 days prior to its planned resumption of service, would be free to use such frequency or frequencies, as of the start-up date specified in the notice.

¹²While we have decided to grant the requests of Continental and American here, as in the public interest, based on the circumstances stated in the request, there should be no expectation that an additional request necessarily will be granted. Any future requests to extend the dormancy waiver for the frequencies at issue here will have to be considered in light of the specific arguments offered in support of the request and any comments that might be filed in response, and in the context of the circumstances present at that time.

There remains no opposition to Delta's request for a temporary, indefinite allocation of unused U.S.-Brazil frequencies. No party disputes that there are enough unused U.S.-Brazil frequencies to fund Delta's request; no party objects to Delta's call for indefinite duration, subject to a notice of planned resumption of service, as described above, served at least 90 days' prior to start-up; and no party objects to Delta's temporary request provided that the Department also grants the requested U.S.-Brazil dormancy waivers.

We will make our award to Delta from an unspecified source, as requested, and we will make the award subject to the condition that the frequencies will revert as described above, upon no less than 90 days' notice to Delta and the Department by American and/or Continental as described in this order.

ACCORDINGLY,

1. We grant the application of Continental Airlines, Inc. (Docket OST-2002-11615) for a waiver of the 90-day dormancy condition applicable to four of its U.S.-Brazil weekly combination service frequencies, for services in the New York (Newark)-Rio de Janeiro market through December 31, 2002;¹³
2. We grant the application of American Airlines, Inc. (Docket OST-1999-6284) for a waiver of the 90-day dormancy condition applicable to two of its U.S.-Brazil weekly combination service frequencies, for services in the New York (JFK)-Rio de Janeiro market, through January 8, 2003;¹⁴
3. We grant the application of Delta Air Lines, Inc. (Docket OST-2002-11627) for a temporary indefinite allocation of four weekly U.S.-Brazil combination service frequencies, which will revert upon no less than 90 days' written notice, served on all parties holding U.S.-Brazil frequency awards, with the Department by American Airlines, Inc. and/or Continental Airlines, Inc., as set forth in this Order;
4. We defer action on the application of Delta Air Lines, Inc. (Docket OST-2002-11711) for a permanent allocation of four weekly U.S.-Brazil combination service frequencies;
5. We require American Airlines, Inc. and Continental Airlines, Inc. to file a written notice with the Department no later than 90 days prior to resuming any previously authorized U.S.-Brazil services, consistent with the terms of this Order; such notice shall be served on all parties with authority to serve the U.S.-Brazil market;
6. We grant all motions for leave to file otherwise unauthorized documents;

¹³Continental's waiver from the dormancy condition is effective until December 31, 2002, or until the date on which Continental begins service with these frequencies, whichever occurs earlier. The 90-day dormancy period will begin on the date Continental begins service. As to any frequency with which Continental does not begin service by December 31, 2002, its allocation with respect to that frequency will expire automatically.

¹⁴American's waiver from the dormancy condition is effective until January 8, 2003, or until the date on which American begins service with these frequencies, whichever occurs earlier. The 90-day dormancy period will begin on the date American begins service. As to any frequency with which American does not begin service by January 8, 2003, its allocation with respect to that frequency will expire automatically.

7. To the extent not granted or deferred by this order, we deny all requests in the application of Continental Airlines, Inc. for a waiver of the dormancy condition applicable to its U.S.-Brazil combination service frequencies (Docket OST-2002-11615); the application of American Airlines, Inc. for a waiver of the dormancy condition applicable to its U.S.-Brazil combination service frequencies (Docket OST-1999-6284); the application of Delta Air Lines, Inc. for a temporary indefinite allocation of four weekly U.S.-Brazil frequencies (Docket OST-2002-11627); and the application of Delta Air Lines, Inc. for a permanent allocation of four weekly U.S.-Brazil frequencies (Docket OST-2002-11711); and
8. We will serve this order on Continental Airlines, Inc.; American Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; the Georgia and Atlanta Parties; the Ambassador of Brazil in Washington, DC; and the U.S. Department of State.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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